UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SIX

INTEGRATED HEALTH SERVICES, INC.,
d/b/a IHS OF GREATER PITTSBURGH

Employer - Petitioner

and Case 6-UC-445

DISTRICT 1199P, SERVICE EMPLOYEES
INTERNATIONAL UNION, AFL-CIO, CLC

Union

## DECISION AND ORDER

The Employer-Petitioner, Integrated Health Services, Inc., d/b/a IHS of Greater Pittsburgh, herein called "the Employer" or "IHS", is engaged in the operation of rehabilitation and long-term care nursing home facilities. The Employer's operation at issue herein involves only its facility in Greensburg, Pennsylvania, herein called the "Employer's facility". The Employer filed a petition with the National Labor Relations Board under Section 9(b) of the National Labor Relations Act seeking to clarify an existing unit of licensed practical nurses, herein called "LPNs".[1] The unit, as certified on June 1, 1992, is as follows: All full-time and regular part-time licensed practical nurses employed by the Employer at its Greensburg,

[1] At the hearing, it was noted that the unit as described by the Employer in an attachment to the petition was incorrect. In that attachment, the current unit was described as including both LPNs and nonprofessional employees. However, at the hearing, the certification in Case 6-RC-10731 was entered into evidence that indicates that the LPNs are a separate unit from the nonprofessional employees. Also at the hearing, the parties stipulated that the LPNs are a separate unit and that, should the LPNs be found to be supervisors within the meaning of the Act, the effect would be to eliminate the entire bargaining unit. However, in its brief, the Employer incorrectly asserts that the LPNs are a part of a larger unit of about 90 employees.

Pennsylvania facility; excluding all other employees, office clerical employees, and guards, professional employees, and supervisors as defined in the Act.[2]

By the petition filed in this matter, the Employer seeks to exclude the entire unit of LPNs. Specifically, the Employer contends that, in light of the United States Supreme Court's decision in NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706 (2001), all of the LPNs at its facility are supervisors within the meaning of the Act. Contrary to the Employer, District 1199P, Service Employees International Union, AFL-CIO, CLC, herein called "the Union", asserts that the requested clarification is not appropriate for the following reasons:

1. The election was held pursuant to a Stipulated Election Agreement;
2. A unit clarification petition is only appropriate if there has been a recent substantial change in the job classification's duties, which has not occurred in this case; and
3. The LPNs at issue are not supervisors within the meaning of the Act.

I have considered the testimony and evidence presented at the hearing in this matter, as well as the arguments presented by both parties in their briefs.[3] I have concluded, as discussed below, that although I agree with the Employer that the petition in this matter is appropriate for consideration, I find that the LPNs at the Employer's facility are not supervisors within the meaning of the Act.

To provide a context for my discussion of the issues, I will first provide an overview of the Employer's operations. I will then present, in detail, the facts and reasoning that support my conclusions in this matter.

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[2] The election in this unit was held pursuant to a Stipulated Election Agreement entered into by the Employer and the Union. At the time of the Union's certification, the Employer's name was "Integrated Health Services, Incorporated and Southwest Convenient Care Products, Group Limited, Partners, d/b/a Laurel View Comprehensive Care Center".

[3] Both parties filed timely briefs which have been duly considered by the undersigned.

## I. OVERVIEW OF OPERATIONS

The Employer is a Pennsylvania corporation engaged in the operation of a long-term care nursing home and rehabilitation facility located in Greensburg, Pennsylvania. The facility has a capacity of about 120 beds; currently the census is about 114 patients. The facility is divided into four wings. Two of the wings are for the long-term care nursing home patients and the other two wings are for patients who require rehabilitation services and acute care. The number of patients is about equally divided between the two kinds of services provided by the Employer.

The facility is a single story building with a basement level. The basement level houses the maintenance department, locker rooms and lounges for the employees. At the street level, beyond the reception area, there is a hallway which houses various types of therapy rooms, such as physical therapy, speech therapy and occupational therapy, as well as the social services office. On one side of the building are two wings which house the patients who are in need of rehabilitation services, and on the other side of the building are two wings which house the long-term nursing home patients. The two rehabilitation wings are referred to as the "100" and the "400" units, and the two long-term nursing home wings are referred to as the "200" and the "300" units. Each of the four units has a nurses' station. There are also administrative offices, kitchen facilities and laundry facilities on the street level main floor.

Don Grant is the administrator of the facility. There are various department heads that report to Grant, including the head of the nursing department, Christine Morgart, Director of Nursing (herein called the "DON"). There are two Clinical Coordinators, Dana Fogle and Shellie Ciaramella, who report to Morgart. Presently, Fogle oversees the 200 and 300 units, and

Ciaramella oversees the 400 unit. [4] The DON as well as the Clinical Coordinators work daylight hours, Mondays through Fridays. The employees work three shifts, from 7:00 a.m. to 3:00 p.m. (daylight); 3:00 p.m. to 11:00 p.m. (afternoon); and 11:00 p.m. to 7:00 a.m. (night). There are two registered nurses (herein called "RNs") who are supervisors during the afternoon and night shifts, and are responsible for the entire operation of the facility during those shifts. RN Gina Kristoff works the afternoon shift and RN Nancy Andrews works the night shift as the house supervisors.[5]

There are approximately 17 full-time and two part-time RNs employed at the facility. In addition, there are approximately 13 casual RNs who do not work on a regular schedule. There are approximately six full-time and five part-time LPNs employed at the facility. Some of the RNs and LPNs work regularly as the charge nurse on one of the units during their shifts, while others act as charge nurse occasionally. Some of the RNs and LPNs perform the regular nursing duties without ever being assigned the additional duties required of the charge nurse. There are approximately 55 certified nursing assistants (herein called "CNAs"), most of whom are full-time.

Units 100 and 400, on the left side as one enters the building, house the rehabilitation side of the Employer's operation. The patients in these units generally come to stay for a limited period of time. Often, these patients have been released from a hospital but require treatments and/or care that they cannot receive in their homes. Many of these patients require intravenous medications, are on ventilators, heart pumps, cardiac monitoring, or need to have dialysis. These acute care units have the following staffing: daylight shift – 3 or 3½ nurses,

[4] At present the Employer is seeking to hire a Clinical Coordinator to oversee the 100 unit.

[5] Based on the entire record herein, I find that Grant, Morgart, Fogle, Ciaramella, Kristoff and Andrews are supervisors within the meaning of Section 2(11) of the Act, inasmuch as they have the authority, inter alia, to issue discipline and direct the work of employees.

either RNs or LPNs[6], and 3 or 3½ CNAs; afternoon shift – 2 or 3 nurses and 3 CNAs; and night shift – 1 or 2 nurses and 2 CNAs.[7]

Units 200 and 300, on the right side of the building, house the long-term care nursing home patients. These patients generally have less immediate medical needs, but require skilled care to administer medications, provide nourishment, bathing, exercise and other daily needs. These two units have the following staffing: daylight shift – 1½ nurses and 3 or 3½ CNAs; afternoon – 1 nurse and 2 or 2½ CNAs; and night – 1 nurse and 2 CNAs.

The CNAs are responsible for the daily care of the patients. In this respect, the CNAs bathe, dress, feed, ambulate, and turn patients. They assist the patients by walking with them or by pushing the patient in a wheelchair to the toilet, the dining area, the therapy rooms or any other area of the facility. The CNAs are also responsible for weighing patients and for taking their vital signs. In addition, they change the bedding in the patients' rooms. If a nurse needs some physical assistance in performing a treatment on a patient, a CNA may be asked to assist. They pass out the meal trays and open any containers that the patients cannot open themselves. The CNAs also cut up food and feed the patients when this kind of assistance is needed.

## II. DUTIES OF THE LICENSED PRACTICAL NURSES

The Employer has a position of Staffing Coordinator, currently held by John Williams. Williams prepares an assignment sheet for each shift of each unit, on which he lists the nurses

[6] Any use to the general term "nurses" herein refers to situations in which the complement may be either RNs or LPNs or a combination of those classifications.

[7] The "½" nurse or CNA is accomplished by having one person spend half of the shift in one unit and half of the shift in another unit.

and CNAs on duty for that particular shift and unit.[8] Upon arrival for the shift, the nurse who is acting as the charge nurse meets with the charge nurse whose shift is ending. The incoming charge nurse receives information regarding any change in the condition of any of the patients in that unit during the previous shift, as well as any special instructions the staff should be aware of regarding any of the patients.

The charge nurse then takes the assignment sheet that has the staff names already on it. The charge nurse divides up the rooms on the unit among the CNAs. These are done in a routine manner with each unit divided into blocks of rooms, and the CNAs rotate weekly among the blocks. In the same manner, breaks and meal times are assigned routinely, so that there is always coverage on the floor. The assignment sheet also has space for the charge nurse to write in which patients are to receive showers that day, which are to receive thickened nourishment snacks, which need their liquid inputs and outputs monitored, which cannot receive food by mouth, which are to be weighed, which are leaving the unit during the shift for various reasons, and so forth.[9] Each of these special instructions has a box on the assignment sheet in which the patient's name is written. There are also some additional duties, such as passing ice to patients and acting as the fire monitor, which the charge nurse fills in each day.[10] The CNAs check this assignment sheet and take care of any of the special instructions for the patients in their block of rooms for the week.

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[8] As stated previously, I use the term "nurses" to denote either LPNs or RNs, inasmuch as it appears that any combination of the two classifications may be assigned to any given unit and shift. The RNs and LPNs perform many identical tasks; the primary difference between the two classifications is that there are certain specific treatments that can only be performed by an RN. Some of these tasks include hanging blood bags or TPN (total parental nutrition) bags, giving IV push medications and giving morphine drips to patients. These duties are more often performed in the rehabilitation units rather than in the long-term nursing care units.

[9] Some of these special instructions, such as showers and weighing, are done on a rotational basis. Other instructions, such as nothing by mouth or thickened nourishment, are relatively permanent.

[10] The passing ice assignment is usually done either by each CNA for the patient rooms for which they are responsible that week or the job is given to the CNA who is assigned to two units during the shift.

The LPNs spend the majority of their time treating the patients. They make rounds to pass medications, assess patient conditions, do treatments on patients, review lab results, discuss lab results with the physicians, and prepare the documentation required for each patient. Some of the rest of their time is spent communicating with the CNAs about the condition of the patients and assisting with the CNAs' duties, such as passing out meal trays and helping to feed patients.

The assignment sheet is kept on a clipboard at the nurses' stations. There are also other sheets kept there which have the rotation of showers and other such information. There is a large binder kept at the nurses' station which holds all of the Employer's policies. This binder has instructions for every type of job duty performed by employees in the nursing department, such as how to lift patients, how to bathe them, how to feed the patients, and so forth.

The LPN is not notified when the CNAs leave and return from their breaks. They do this in a rotation as listed on the assignment sheet. If the patients' needs required a CNA to miss their scheduled break, they might inform the LPN of this and then take a later break. The LPNs do not have the authority to assign overtime to CNAs or to call in employees if they feel the unit is short-staffed. The charge nurse may report a staffing shortage to the staffing coordinator, the clinical coordinator or the house supervisor, and that individual will decide what, if anything, should be done to provide more staff to the particular unit. If a CNA is unhappy with their assignment for some reason, they may ask the LPN to rearrange the assignments; other times, the CNAs may agree to switch assignments on their own and then inform the charge nurse that this has been agreed upon. The record does not reflect any instances where a charge nurse has refused to allow a change in room assignments requested by CNAs.

When the shift is over, the charge nurse meets with the incoming charge nurse for the next shift. The nurse who is leaving gives a report to the next charge nurse, informing the

incoming nurse about any changes in condition of any patients, and of any particular situations which need to be noted.

## III. APPROPRIATENESS OF A UNIT CLARIFICATION PETITION

The Union takes the position that a unit clarification petition is inappropriate in this instance because, in 1992, the parties signed a Stipulated Election Agreement in which it was agreed that the LPNs were included in the unit, and because there has been no substantial recent change in the duties of the LPNs which would justify a change in their status to be considered supervisors within the meaning of the Act. The Employer, to the contrary, asserts that the unit clarification petition is appropriate at the present time because of the recent decision of the United States Supreme Court in NLRB v. Kentucky River Community Care, Inc., supra, and because the LPNs' duties have increased in recent years due to the increased acuity of the patients.

Based on Board law and the record herein, I do not agree with the Union's position that a unit clarification petition is inappropriate herein. In reaching this conclusion, I note that, while the law itself has not changed, the Supreme Court's decision in NLRB v. Kentucky River Community Care, Inc. requires the Board to reassess its analysis of the use of independent judgment when making decisions regarding the supervisory status of individuals. I find that the instant case is similar to the one in University of Dubuque, 289 NLRB 349 (1988). In that case, as in the instant one, the Employer filed a unit clarification petition during the term of a contract. In that case, the Employer's petition was based on a recent United States Supreme Court decision in NLRB v. Yeshiva University, 444 U.S. 672 (1980), which required the Board to review its analysis of "managerial employees".

In University of Dubuque, supra, the Union argued that the unit clarification petition was inappropriate because the unit had existed for a number of years and there had been no recent

substantial change in the employees' duties to warrant a unit clarification. The Board in that case found that a unit clarification petition was appropriate to be considered at that time even absent any significant change in the duties of the employees at issue. University of Dubuque, supra at 350. Thus, the Board was willing to entertain the Employer's petition.

Further, in University of Dubuque, the Employer had granted voluntary recognition to the Union at the time it organized the employees. Although an election was held pursuant to a Stipulated Election Agreement in the instant case, the situation is similar inasmuch as in both cases, the Employer could have, but did not, initially challenge the status of the employees at issue. However, in the present case, the agreement to include LPNs in a unit was made a number of years prior to the Supreme Court's decision in NLRB v. Kentucky River Community Care, Inc., and was based on the Board's interpretation of Section 2(11) of the Act at that time. As in University of Dubuque, the Board has been required by a decision of the United States Supreme Court to review its analysis of the Act. I find that, as in University of Dubuque, this potential change in the interpretation of the Act is sufficient to allow a unit clarification petition to be entertained.

The Union cites Grancare, Inc. d/b/a Premier Living Center, 331 NLRB 123 (2000) and I.O.O.F. Home of Ohio, Inc., 322 NLRB 921 (1997) in support of its position that a unit clarification petition should not be entertained herein because the Employer had originally stipulated to the unit. The Union argues that these cases hold that an Employer cannot re-litigate issues that were or could have been litigated in a prior proceeding. Grancare, Inc. d/b/a Premier Living Center, supra. Therefore, the Union asserts that the Employer herein could have taken the position that the LPNs were supervisors originally, and since it did not do this, it is now estopped from raising the issue.

I find these two cases to be distinguishable from the present case, and thus they are not controlling herein. In both cases, the Employer stipulated to a unit without raising a supervisory issue, and then very shortly thereafter changed its position on the supervisory status. Thus, in

both Grancare, Inc. d/b/a Premier Living Center and in I.O.O.F. Home of Ohio, Inc., the Employer raised the supervisory issue only about six months after signing a Stipulated Election Agreement. In both of those cases, the Board held that since the Employers could have raised and litigated the issue of supervisory status so recently, they were then barred from raising the issue. I.O.O.F. Home of Ohio, Inc., supra at 922.

In the present case, the Stipulated Election Agreement was entered into about ten years ago, and was based on the Board's analysis of the Act at that time. This is quite different from the situations in Grancare, Inc. d/b/a Premier Living Center and in I.O.O.F. Home of Ohio, Inc., where the respective employers almost immediately changed their positions following the signing of Stipulated Election Agreements. In those cases, there was no change either in the duties of the individuals at issue or in the interpretation of the law. In the present case, the Supreme Court's decision in NLRB v. Kentucky River Community Care, Inc., supra, requires the Board to reassess its interpretation of certain aspects of the indicia of supervisory status. In addition, the Employer asserts that there has been a change in the duties and responsibilities of the LPNs recently. Thus, I find Grancare, Inc. d/b/a Premier Living Center and I.O.O.F. Home of Ohio, Inc. to be inapposite herein.

Moreover, I find that the timing of the petition in this case is appropriate. In the present case, the petition was filed 67 days prior to the expiration of the collective-bargaining agreement. In Shop Rite Foods, Inc., 247 NLRB 883 (1980), the Employer filed a similar petition 101 days prior to the expiration of the contract. In that case, the Board stated that unit clarification petitions that are filed either early or in the middle of a contract could be disruptive of the collective–bargaining relationship. Id. However, the Board found the timing in that instance to be appropriate, since it was close to the conclusion of the contract. Id. In the present case, the petition was filed even closer to the expiration of the contract. Consequently, I find the timing of the present petition to be appropriate.

Accordingly, I find that the unit clarification petition was timely filed in the present case and the hearing officer's denial of the Union's Motion to Dismiss the instant petition is hereby affirmed.

## IV. THE SUPERVISORY STATUS OF THE LICENSED PRACTICAL NURSES

As previously stated, the Employer filed the present unit clarification petition on the ground that the LPNs at the Employer's facility are supervisors within the meaning of the Act. In so asserting, the Employer contends that the LPNs have the authority to assign, direct, transfer and discipline employees and to adjust their grievances.[11] The Union, on the other hand, asserts that the LPNs are not supervisors within the meaning of the Act, and even under the analysis required by NLRB v. Kentucky River Community Care, Inc., supra, the LPNs' authority does not reach the level of supervisory authority. As described in more detail below, I find that the Employer has not met its burden of establishing that the LPNs are supervisors, and therefore, I shall dismiss the unit clarification petition herein.

Section 2(11) of the Act defines the term supervisor as:

> [A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

To meet the definition of supervisor in Section 2(11) of the Act, a person needs to possess only one of the 12 specific criteria listed, or the authority to effectively recommend such action. Ohio Power Co. v. NLRB, 176 F.2d 385 (6th Cir. 1949), cert. denied 338 U.S. 899

[11] There was no evidence presented at the hearing nor was there any assertion by the Employer that the LPNs have any authority to hire, suspend, lay off, recall, promote, discharge or reward employees.

(1949). The exercise of that authority, however, must involve the use of independent judgment. Harborside Healthcare, Inc., 330 NLRB 1334 (2000).

The burden of proving supervisory status lies with the party asserting that such status exists. NLRB v. Kentucky River Community Care, Inc., supra at 710–712; Michigan Masonic Home, 332 NLRB No. 150, slip op. at 1 (2000). This is a substantial burden in light of the exclusion of supervisors from the protection of the Act. Boston Medical Center Corp., 330 NLRB 152, 201 (1999). The Board has frequently warned against construing supervisory status too broadly because an employee deemed to be a supervisor loses the protection of the Act. See, e.g., Vencor Hospital – Los Angeles, 328 NLRB 1136, 1138 (1999); Bozeman Deaconess Hospital, 322 NLRB 1107, 1114 (1997). Lack of evidence is construed against the party asserting supervisory status. Michigan Masonic Home, supra, slip op. at 1. Mere inferences or conclusionary statements without detailed, specific evidence of independent judgment are insufficient to establish supervisory authority. Sears, Roebuck & Co., 304 NLRB 193 (1991).

Moreover, the issue of supervisory status is highly fact-specific and job duties vary; thus, per se rules designating classifications as always or never supervisory are generally inappropriate. Brusco Tug & Barge Co., 247 F. 3d. 273, 276 (D.C. Cir. 2001).

The Board and the courts have observed a three-pronged test when analyzing whether an individual is a supervisor within the meaning of the Act.

> Employees are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 listed supervisory functions, (2) their 'exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment,' and (3) their authority is held 'in the interest of the employer'.
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> Franklin Hospital Medical Center d/b/a Franklin Home Health Agency, 337 NLRB No. 132, slip op. at 4 (2002), citing NLRB v. Kentucky River Community Care, Inc., supra.

The exercise of "some supervisory authority in a merely routine, clerical, perfunctory, or sporadic manner," or through giving "some instructions or minor orders to other employees"

does not confer supervisory status. Franklin Hospital Medical Center d/b/a Franklin Home Health Agency, supra at 4, citing Chicago Metallic Corp., 273 NLRB 1677, 1689 (1985).

With regard to the use of independent judgment, it is difficult to analyze whether individuals alleged to be supervisors have the authority to responsibly direct employees within the meaning of Section 2(11) of the Act, particularly in the health care field, since the Board, prior to Kentucky River Community Care, Inc., held that employees are not using independent judgment when they utilize ordinary professional judgment in directing less-skilled employees in accordance with employer-specified standards. This view was rejected by the Supreme Court in Kentucky River Community Care, Inc., supra at 713, finding that this categorical exclusion was overly broad.

However, the Supreme Court did accept two aspects of the Board's interpretation of independent judgment. First, the Court agreed that the term "independent judgment" is ambiguous, and that many nominally supervisory functions may be performed without such a degree of judgment or discretion as to warrant a finding of supervisory status. Second, the Court found that detailed orders and directions from the employer may reduce the degree of judgment exercised below the statutory threshold for supervisory status. Id. at 713–714. The Court allowed that the Board has the discretion to make the determination as to whether the degree of judgment utilized reaches the level of independent judgment sufficient to warrant a finding of supervisory status. Id.

The Supreme Court did not find that all nurses are supervisors in Kentucky River Community Care, Inc.. Rather, it left it to the Board to analyze the facts of each individual case to determine whether, in light of the findings in Kentucky River Community Care, Inc., the individuals at issue utilize independent judgment. If the judgment being analyzed is constrained by employer-specified standards, or higher authorities have not delegated power to the individuals to make independent decisions, then the judgment may well be routine and not considered supervisory within the meaning of the Act.

As previously stated, contrary to the Union, the Employer-Petitioner contends that the LPNs at its facility are supervisors because it asserts that the LPNs have the authority to assign, responsibly direct, transfer and discipline employees and to adjust their grievances.[12] Upon the entire record, and in light of the direction of Kentucky River Community Care, Inc., I have concluded that the LPNs in this case are not supervisors within the meaning of the Act. I shall discuss each of the indicia at issue below.

## A. ASSIGNMENT OF WORK

As described previously, the charge nurses fill out an assignment sheet each day that already has on it the individual CNAs' names who are to work in the unit for that particular shift. Each unit is divided into three blocks of rooms. The charge nurse fills in the block of rooms that each CNA should take care of for that shift. These assignments are made on a weekly, rotational basis, and are not assigned with consideration of the individual patients or employees. Although, very rarely, a charge nurse will change the assignment because of patient preference, there is no indication, contrary to the assertion in the Employer's brief, that the skill or the experience of the CNAs is considered in making assignments.[13]

There are also several boxes on the assignment sheet in which the charge nurse fills in patients' or CNAs' names. These boxes indicate special needs of particular patients, as well as

[12] As previously noted, the Employer-Petitioner does not assert, either through evidence presented at the hearing or through its brief, that the LPNs possess any of the other indicia of supervisory authority enumerated in Section 2(11) of the Act. Consequently, I have not discussed those indicia in this decision.

[13] Although, in its brief, the Employer argues that the skills and experience of the CNAs are considered when making or changing assignments, the evidence presented at the hearing does not support this assertion. Rather, it appears that the charge nurses make and occasionally change assignments in a purely routine manner. The assignments are made only by room numbers, and there was no evidence that the individual skills or experience of any CNAs are considered when making such assignments. Even if an assignment is changed, perhaps because a patient prefers the CNA to be of the same sex as they are, the change is made only with regard to the sex of the employee and not because of any particular skill or experience of the individual.

particular tasks, such as passing ice, for the CNAs, and also when the CNAs are to take their breaks. However, there is no evidence that these assignments involve the use of independent judgment.[14] Rather, the special instructions for patients, such as bathing, leaving the facility during the shift, no food by mouth, weighing, and so forth, are assigned to whichever CNA is taking care of that patient during that shift. The assignment is indicated by the Employer's regulations and/or the physician's orders. There is no indication that there is any decision-making by the charge nurse regarding special patient instructions. With regard to special duties of the CNAs, such as passing ice, this is also done on a rotational basis, or by the block of rooms on the assignment sheet, and does not appear to involve any independent judgment. The times for the CNAs to take breaks and meals, filled in by the charge nurse on the assignment sheet, appear to be routine and rotational, without consideration of the individual CNAs.

Further, all of the tasks assigned to the CNAs by the charge nurse appear to be described in detail in the Employer's regulations and policies, which are stored in a large binder at each nurses' station. The types of assigned tasks, as well as instructions concerning how to perform the tasks, are detailed in these binders. Thus, the charge nurse is merely passing on information from the Employer, but does not use independent judgment in making such assignments.

As discussed above, Kentucky River Community Care, Inc. allows the Board to distinguish between routine assignments and those requiring such discretion as to rise to the level of independent judgment. The Board has repeatedly found that work assignments made

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[14] As discussed above, in its brief the Employer asserts that the charge nurses use independent judgment in changing assignments of the CNAs. I find the evidence lacking in support of this assertion. The few changes of assignments that are made by the charge nurses are done in a routine manner, without regard to any personal skills of the CNAs involved. In fact, some of the examples of such changes that were brought out through testimony at the hearing indicate that the CNAs themselves sometimes switch assignments among themselves and then inform the charge nurse of their switch. The record indicates

to equalize work on a rotational or other rational basis are routine assignments. Providence Hospital, 320 NLRB 717, 727 (1996), enfd. 121 F. 3d 548 (9th Cir. 1997); Ohio Masonic Home, 295 NLRB 390, 395 (1989). Further, an LPN's authority to change lunch or other break times to address patient needs is routine in nature and does not require the use of independent judgment. Providence Hospital, supra. In this case, I find that the assignment of work by the charge nurses is limited, routine and clerical, and is not indicative of independent judgment sufficient to confer supervisory status.[15] See also, Ten Broeck Commons, 320 NLRB 806, 809 - 811 (1996).

### B. DIRECTION OF WORK

The charge nurses, as well as the other LPNs assigned to a particular unit, spend the majority of their time during the shift performing nursing functions, such as passing medications, doing treatments and filling out documentation. In the course of their work, they observe the tasks performed by CNAs, which involve the basic care of the patients. These tasks include

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that the charge nurses routinely approve of such switches arranged by the CNAs, and no examples were given where such switches arranged by the CNAs were not approved by the charge nurse.

[15] In its brief, the Employer refers to and attaches a copy of a Regional Director's Decision and Clarification of Bargaining Unit in Harlan Nursing Home, Inc., Case 9-UC-462. I find that decision to be distinguishable from the present case. In that case, the Regional Director found that the charge nurses considered the skills and experience of the CNAs in making assignments. As discussed previously herein, such consideration of skills and experience is not utilized by the charge nurses in the present case.

Another difference is that, in that case, the CNAs were required to inform the charge nurse when they were leaving on their breaks, while in the present case, there was no indication that the CNAs were required to do this. Rather, it appears from the record evidence that the charge nurse fills in the breaks for the CNAs on the daily assignment sheet in a routine manner, and that the CNAs take their breaks without the necessity of informing the charge nurse when they are leaving.

Significantly, in Harlan Nursing Home, Inc., the charge nurses had the authority to discipline the CNAs, while in the present case, the charge nurses possess no authority to discipline. Thus, while a charge nurse in the present case may point out to a CNA duties that were not performed adequately, the charge nurse has no authority to issue discipline to the CNA. Thus, I find the Regional Director's decision in Harlan Nursing Home, Inc. to be distinguishable from the present case.

bathing, feeding, taking vital signs, ambulating, dressing and so forth. The charge nurses do not go through the unit checking on the work of the CNAs, or watching that they do each task correctly. Rather, if they see that a task was not performed correctly, or was skipped by a CNA, the nurse might mention it to the individual CNA. The Board has consistently held that merely calling attention to the deficiencies of work does not rise to the level of supervisory status. Ten Broeck Commons, supra.

As with the assignment of work, the direction of work as performed by the LPNs appears to be routine and lacking in the use of independent judgment. As described above, the manner in which specific job duties should be performed is described in great detail in the policy binders at each nurses' station. The LPNs do not make decisions as to how the tasks are to be done; this is prescribed in the binders. It is notable that the LPNs have no authority to discipline the CNAs to whom the work was assigned, nor are the LPNs held accountable for the work of the CNAs. Thus, I find that, under Kentucky River Community Care, Inc., the Employer-Petitioner has not met the burden of proving that the LPNs use independent judgment in the direction of work by CNAs.[16]

### C. TRANSFERRING CNAs

The Employer-Petitioner also contends that the LPNs have the authority to transfer employees. However, the only evidence of any instances of transferring employees was a single question to LPN witness Patricia Kinzel regarding situations where units might be short-

[16] The Employer also raised examples of the LPNs informing housekeepers of work that needed to be performed on the unit, such as cleaning up a spill on the floor. Likewise, evidence was developed about LPNs sending trays back to the dietary department when the food was not correct for a particular patient. However, the evidence also revealed that CNAs also inform housekeeping and dietary employees about changes or problems on the unit. There is no evidence that either the LPNs or the CNAs have any authority over the housekeeping or dietary employees other than informing them of needed service. Thus, it appears that this is a reportorial function and is not an indicium of supervisory authority.

staffed on a weekend, and the LPN might have called the house supervisor to request more help on her unit. The LPN responded that the house supervisor "usually" agrees with the LPN and sends more staff to the unit. However, this one example hardly qualifies as proof that the LPNs have the authority to transfer employees. Rather, from this question and response, it is clear that the LPNs do not have the authority to transfer employees. The LPNs can only request that the house supervisor make a transfer, but have no independent authority to transfer employees on their own. Thus, I find that the Employer-Petitioner has failed to meet its burden to prove that LPNs have the authority to transfer employees.

### D. DISCIPLINE

The Employer asserts that the LPNs have the authority to recommend discipline of CNAs. In support of this assertion, the only example given was a situation in which an LPN reported to her supervisor that the LPN had observed a CNA eating food from a patient's tray. However, the LPN never heard anything further about the incident after it was reported, and did not know if any investigation was conducted and/or if any discipline was issued to the individual.[17]

The Employer also asserts that the LPNs can issue verbal discipline to the CNAs. I find this assertion is unsubstantiated by the evidence. Rather, as described in the above example, it appears that LPNs can only report a potential problem to the clinical coordinators who are their supervisors. The clinical coordinator investigates the matter and decides, without further consultation with the LPN, whether discipline is warranted or not. In fact, the testimony indicated that the LPNs are not even informed of the outcome of investigations made by the clinical coordinator once a potential problem is reported to them by an LPN.

[17] It is also possible that CNAs could report such observations to the supervisors at the facility.

The only example provided by the Employer to support this assertion that LPNs can issue verbal warnings related to an incident where one CNA questioned an LPN regarding another CNA taking a long break. The LPNs would not be aware of this occurring unless another CNA mentioned it because the other CNA was waiting to take their break when the first CNA returned. In response to the question, the LPN stated that she might ask the CNA to watch the time on their breaks. I do not find this to be a disciplinary action taken by the LPN. Thus, I find that the Employer failed to meet the burden to prove that the LPNs possess the authority to issue discipline.

### E. ADJUSTMENT OF GRIEVANCES

Finally, the Employer-Petitioner asserts that the LPNs are supervisors within the meaning of the Act because they have the authority to adjust grievances. In this respect, the LPNs' role is limited to informally resolving minor problems with residents or with staff. For example, a resident or the resident's family may make a complaint to an LPN relating to the resident's care. The record indicates that such complaints are also addressed to CNAs at times. Also, LPNs sometimes attempt to resolve minor problems relating to the duties of the CNAs. An example of this might be when a CNA cannot complete all of the duties on their block of rooms because a particular patient requires extra care. The LPN might ask other CNAs to assist or the LPN might perform some of the duties for the CNA.

Other than informally resolving such minor complaints, the LPNs play no role in any formal grievance resolution procedures. The limited involvement of the LPNs in the dispute resolution process is not an indicium of supervisory status within the meaning of the Act. Illinois Veterans Home, 323 NLRB 890, 891 (1997); Ohio Masonic Home, 294 NLRB at 395; Beverly Enterprises d/b/a Beverly Manor Convalescent Centers, 275 NLRB 943, 946 (1985).

Significantly, the only testimony at the hearing provided by a CNA, Thomas White, indicates that the CNAs do not consider the LPNs to be their supervisors. According to White, who has worked as a CNA at the facility for six years, the respective clinical coordinators, RN house supervisors and/or the DON, not the LPN, is the immediate supervisor of the CNAs. The CNAs would go to the clinical coordinator of the unit with any problems relating to personal issues, or any other issue aside from patient care. White clearly states that the LPNs are not his supervisors, and that the CNAs have never been instructed otherwise or been instructed to go to the LPNs prior to approaching the clinical coordinator. [18]

## V. FINDINGS AND CONCLUSION

Based upon the entire record in this matter and in accordance with the discussion of the issues above, I find and conclude as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. District 1199P, Service Employees International Union, AFL-CIO, CLC is a labor organization within the meaning of Section 2(5) of the Act.

[18] The Employer cites Passavant Retirement & Health Center v. NLRB, 149 F.3d 243 (3d Cir. 1998), in support of its position regarding the adjustment of grievances. However, that case involved the charge nurses' resolution of complaints that could ripen into grievances cognizable under the collective-bargaining agreement covering the aides. In contrast, in the present case, the LPNs are merely giving routine direction rather than informally resolving disputes that would constitute contractual grievances. In fact, the grievance procedure in the collective-bargaining agreement between these parties describes the first step in the procedure as involving the grievant and/or his Union representative and the immediate supervisor. Since, as White described, the CNAs consider the clinical coordinators, the RN house supervisors, and/or the DON, but not the LPNs, to be their immediate supervisors, it is clear that the LPNs have no dealings with matters which would constitute contractual grievances. Thus, I find Passavant to be factually distinguishable from the present case.

In sum, based on the above and the record as a whole, I find that, in light of the direction given by the United States Supreme Court in Kentucky River Community Care, Inc. , the LPNs employed at the Employer's facility are not supervisors within the meaning of Section 2(11) of the Act. Therefore, I find no valid issue has been raised concerning the removal of the LPNs from their bargaining unit through a unit clarification proceeding.[19] I shall, therefore, dismiss the petition in the instant case.

## ORDER

IT IS HEREBY ORDERED that the petition filed herein be, and it hereby is, dismissed.

[19] The Employer-Petitioner also raised an argument that, because of increased acuity of the patients in the facility, the LPNs' duties have increased over the years since the Stipulated Election Agreement was signed, and consequently they now have more supervisory authority. Although the record reflects that the acuity level of the patients has increased, there was insufficient evidence to prove that this increase has resulted in more supervisory authority of the LPNs. Rather, it appears that there is more work for all of the nursing staff because the patients, particularly those in the rehabilitation side of the facility, are in need of more care and attention than previously. However, the evidence did not reflect a change in the amount of supervisory authority as a result. Thus, the Employer-Petitioner failed to meet its burden of proving that the increased acuity of the patients has resulted in increased supervisory authority of the LPNs.

## VI. THE RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., on **January 2, 2003.** The request may **not** be filed by facsimile**.**

Dated: December 19, 2002.

Gerald Kobell
Regional Director, Region Six

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